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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

REPLY BRIEF ON BEHALF OF PETITIONER, EARL MOORE.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY.

The sole error urged in petition for certiorari herein was the action of the Circuit Court of Appeals for the Fifth Circuit in holding that the three year statute of limitations of the State of Mississippi is applicable in this cause.

This is the sole error assigned here and is, accordingly, the sole question discussed in petitioner's original brief filed herein.

Respondent did not file cross petition for certiorari, but in its brief filed herein undertakes to support the judgment of the circuit court of appeals which reversed the judgment of the district court in petitioner's favor upon a ground as to which the court of appeals found against respondent. Apparently, this procedure is permitted under the authority of previous decisions of this court, of which *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544, is typical.

The asserted ground is that the circuit court of appeals was in error in holding that the district court properly sustained petitioner's demurrer to a so-called plea in abatement filed in said district court by respondent.

This plea in abatement is found in the record (Tr. pp. 60-62, inclusive).

Petitioner's demurrer to said plea in abatement appears in the record (Tr. pp. 63-64, inclusive).

The substance of this plea in abatement is that this action at law cannot be maintained because of the failure on the part of petitioner to pursue the procedure provided by the provisions of the contract sued on; and, further, because the petitioner elected to propound his claim in a court of law rather than before the National Railroad Adjustment Board created by act of Congress of June 21, 1934, Title 45, United States Code Annotated, Section 153.

ARGUMENT.

Moore, petitioner, was discharged by the railroad, respondent, on February 15, 1933. Hearing was had before the local railroad officials on February 20, 1933. Any appeal from such hearing had long since been abandoned prior to the creation of the National Railroad Adjustment Board on June 21, 1934. There was nothing whatever pending in connection with petitioner's claim from February 20, 1933, until September 15, 1936, when the lawsuit now before the court was filed.

If petitioner's claim, as evidenced by this lawsuit, was ever such a dispute as it was contemplated came within the jurisdiction of the National Railroad Adjustment Board, which fact we deny, then in no event was the same a pending dispute at the time of the creation of said National Railroad Adjustment Board by act of Congress of June 21, 1934. See *Stevenson* v. *N., O. & N. E. R. R. Co.*, 180 Miss. 147, 177 So. 509.

When petitioner's cause of action arose, and during the time the same might be termed a pending dispute, there was in force a Railway Labor Act of May 20, 1926, Title 45, Section 146, *et seq.*, United States Code Annotated, and there was in existence the boards of adjustment and of mediation created thereunder.

It is perfectly apparent that the Railway Labor Act of 1926, which was the act in force at the time this cause of action accrued, created a board of arbitration and a board of mediation available for the voluntary submission of disputes of a certain nature between railroads and employees. The submission of disputes even of the kind and character contemplated by the act to the boards of arbitration provided was in no sense mandatory, and the boards were available to the parties as boards of

arbitration only when there was a written agreement or contract between the parties for the submission of such disputes to such boards for arbitration. See the first provision, Provision (a), Subsection 3, Section 146, also, Provision A, Subsection 8, of said Section, Title 45. No such contract or agreement is alleged by the plea to have been in existence, or is exhibited thereto.

It will be remembered that this is a straight-out action at law, a suit for damages for the alleged wrongful breach of a contract of employment, which said breach arose on February 15, 1933; a suit by a discharged employee because he was discharged in violation of his contract of employment. He is in no sense seeking reinstatement. This is not a dispute growing out of a grievance, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. After February 15, 1933, petitioner was no longer an employee of respondent.

Subsection 2, Section 146, Title 45, states that the adjustment board might act as arbitrator between a carrier and its employees in disputes of certain nature, "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Subsection 5, Section 146, Title 45, provides that the board of mediation might proffer its services in disputes between carriers and employees concerning rates of pay, rules or working conditions, etc.

Can it be said that this suit for damages by a discharged employee for a breach of his contract of employment was such a dispute as was in the contemplation of said Railway Labor Act, even if the written agreement for arbitration had been in effect and even if the arbitration or mediation as provided by said act had been mandatory.

The purpose of the Railway Labor Act is as stated by the court in *Estes et al.* v. *Union Terminal Company*, 89 F. 2d 768:

> "To facilitate peaceful, orderly adjustments of disputes between railroads and their employees, to prevent strikes and other disturbances."

We respectfully submit that a suit as is this by a discharged employee for damages for a wrongful breach of a contract of employment does not come within the purpose as set forth.

There is nothing involved here, except a personal property right, and "the courts will take hold of and protect personal and property rights in whatever way it may be sought to disregard them." This rule is supported by the authorities generally, of which *Independent Order, etc.*, v. *Wilkes*, 98 Miss. 179, 53 So. 403, *Eminent Household of Woodmen* v. *Ramsay*, 118 Miss. 454, 79 So. 351, and authorities cited, are typical.

Decisions which do not involve the individual personal and property rights of an individual which he has sought to enforce in court are not persuasive. Here a discharged employee, who by reason of such discharge has long since lost all his rights as an employee, has brought suit in a court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment.

The rights of an individual to appeal to the courts for the redress of wrongs and of trial by jury are rights which, under our Constitution, are inalienable, and to construe the Railway Labor Act as taking away this right makes the same violative of both the Seventh and Fourteenth Amendments to the Federal Constitution. To take away such rights to appeal to the courts of the State of Mississippi is violative of Section 24 of the State Constitution, which is as follows:

> "Section 24. All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay."

A provision similar thereto is found in the constitutions of most of the states of the Union.

It was clearly not the purpose of the Railway Labor Act of 1926, which was the act in force at the time the instant cause of action accrued, to take away from a discharged employee whc was no longer an employee the right to resort to the court in such a case as involved here. And, while we do not believe the Act of 1934 creating the National Railroad Adjustment Board is in any manner involved here, there being no pending dispute at the time of the creation of said board, likewise it is clearly not the intention of such act to deprive an individual, discharged employee of his right to resort to a court of law to enforce his individual property right by a suit for damages for his wrongful discharge in breach of his contract of employment.

While this is not such a dispute between a carrier and its employees, as is contemplated by either the Railway Labor Act of 1926 or the Railway Labor Act of 1934, both of said labor acts, and particularly is this true of the Act of 1926, are permissive only.

The rule of construction is:

> "Words of permissive character may be given a mandatory significance to effect the legislative intent, and when the terms of a statute are such that they cannot be made effective to the extent of giving each and all of them some reasonable operation, without construing the statute as mandatory, such construction should be given; but the power to construe a statute permissive in form as mandatory should be exercised with reluctance, and only where the

clear intent, as shown by the context, demands such construction."

59 Corpus Juris 1073.

In 59 Corpus Juris, page 1124, *et seq.*, the rule of construction applicable is further announced:

> "Except where the rule has been changed by express enactment, or statutes are remedial in part, or where the legislative intent is not ambiguous, obscure, or doubtful, all statutes in derogation of the common law or common rights, are to be construed strictly; and as an implied abrogation of the common law is not favored, these statutes will not be construed to change the common law beyond what is expressly declared, or is necessarily implied, as from the fact that it covers the whole subject matter."

And again 59 Corpus Juris 1130:

> "Procedural statutes should be given a construction, if possible, which will preserve the essentials of harmony and consistency in the judicial system, and the established practice under a statute should not be changed except by the clearly expressed will of the lawmakers, nor should they be construed to take away a long-established and frequently used remedy unless they contain a clear and direct expression of an intention to do so. But statutes which take away, change, or diminish fundamental rights, statutory remedies for rights unknown to the common law, and statutes which provide new and extraordinary remedies, must be construed strictly, both as to the cases embraced within their terms and as to the methods to be pursued."

At the time of the passage of the Railway Labor Act, there can be no doubt but that under the existing law and the existing decisions, petitioner might have maintained this action for damages for breach of contract. The Railway Labor Acts simply create a new permissive remedy for an existing right. The Railway Labor Acts do not by their terms take away from petitioner the remedy af-

forded to him by the existing law of taking his cause of action to the courts.

The rule of statutory construction in such a case is: "A statute creating a new remedy for an existing common-law cause of action, containing no express or implied negative, does not, as a rule, take away the common-law remedy, but the party may still sue at common law as well as upon the statute. In such cases, the statutory remedy will be regarded as merely cumulative."

The quotation is from American Jurisprudence, Volume 1, page 411, Section 12. See authorities there cited Note 12, including *United States* v. *Stevenson,* 215 U. S. 190, 54 L. Ed. 153.

The Solicitor General of the United States in his able memorandum brief filed herein has discussed the substitution of the word "may" in the 1934 act for the demanding word "shall" as contained in the prior acts. This occurs to us as significant, in view of the situation as pointed out by the Solicitor General.

As we understand the rule of statutory construction in this regard, it is that the legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended. *Louisville, etc., R. R. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297; *Johnson* v. *United States,* 225 U. S. 405, 56 L. Ed. 1142; etc.

Section 153, Subsection 1, of the 1934 Act, gives jurisdiction to the adjustment board in disputes between employees or groups of employees and a carrier growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, and provides that such disputes "shall be handled in the usual manner up to and including the

chief operating officer of the carrier designated to handle such disputes; but failing to reach an agreement in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board," etc.

We have pointed out that this is not such a dispute as contemplated by the act, and that this was not a dispute or case pending and unadjusted on June 21, 1934.

It is apparent that in any event handling in the usual manner through the operating officers of the carrier is a condition precedent to reference to the adjustment board.

Respondent in the state court in which this action was originally tried and in the district court raised the question of the right of petitioner to maintain this suit until he had handled by appeal to the operating officers of the carrier. This question was raised in the state court by respondent's plea designated as special plea No. 4, and was likewise raised in the federal district court by plea similarly designated.

The Mississippi State Supreme Court in its decision in this case, *Moore* v. *Illinois Central Railroad Company,* 180 Miss. 276, 176 So. 593, held as did the circuit court of appeals that compliance with such provision was not a mandatory condition precedent to the maintaining of this cause of action. The state court's discussion of this question is found in the opinion of the court. The opinion of the Supreme Court of the State of Mississippi in full is included in petitioner's original brief as an appendix thereto. This particular discussion is found beginning last paragraph page 16 of said appendix. The holdings of the Mississippi Court and of the circuit court of appeals on the point find ample support in the authorities, of which the authorities cited in the opinion of the Mississippi court are typical.

If compliance with the condition precedent of appealing to the operating officers of the carrier, where the

word "shall" is used in the Labor Act of 1934, is not a mandatory requirement, then certainly the resort to the adjustment board cannot be said to be a mandatory requirement.

Due to the able discussion by the Solicitor General of the United States in his memorandum brief filed herein, we do not consider further discussion of this question necessary.

The Solicitor General has recognized the handicap under which petitioner would necessarily be placed in undertaking to carry his case through the necessary procedure to the adjustment board. We assert as a fact that, under the existing circumstances, such would be utterly impossible.

The Solicitor General has suggested that if the court should hold that the adjustment board has primary jurisdiction that this cause not be finally dismissed, but that an opportunity be afforded to petitioner to present his case through the required procedure to the adjustment board. A competent court has adjudicated that petitioner was wrongfully discharged, and that he is entitled to recover damages for a breach of his contract of employment. With all deference, we say that it would be grossly unfair to require this citizen, necessarily of limited means, to resort to such a procedure, which, on its face and under the circumstances, is impossible.

Conclusion.

We again, therefore, respectfully submit that the Circuit Court of Appeals for the Fifth Circuit is in error in holding that the Mississippi three year statute of limitations is applicable in this case, contrary to the holding of the Supreme Court of the State of Mississippi in this identical case, and that the judgment of the court of appeals reversing the judgment of the Mississippi Supreme

Court in favor of petitioner and in favor of respondent is erroneous.

Respectfully submitted,

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Certificate.

Service of the foregoing Brief for Petitioner is hereby acknowledged, this the.....day of March, 1941.

JAMES L. BYRD,
Jackson, Mississippi,
Of Counsel for Respondent.